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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063588
Party	Defendant Go Daddy Operating Company, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	Motion to Dismiss Cancellation No 92063588.pdf(19276 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 2,558,989

Mark: GO DADDY

Date of Registration: April 9, 2002

KIMBERLY SIMMONS

Petitioner,

v.

GO DADDY OPERATING  
COMPANY, LLC

Registrant.

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Cancellation No. 92063588

**GO DADDY’S MOTION TO DISMISS WITH PREJUDICE**

Registrant Go Daddy Operating Company, LLC (“GoDaddy”), moves pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP § 503 to dismiss Petitioner Kimberly Simmons’ (“Simmons”) petition for cancellation of U.S. Reg. No. 2,558,989. Simmons lacks standing to assert a claim for cancellation, and even if Simmons had standing, Simmons fails to allege facts sufficient to support a plausible claim that GoDaddy committed fraud in obtaining its registration.

**I. STATEMENT OF FACTS**

Simmons seeks to cancel incontestable U.S. Reg. No. 2,558,989 for “computer programs, namely, programs for creating, posting and maintaining websites on the global computer network; computer graphics software, computer authoring software, and digitized graphics modules for designing and developing web sites on a global computer network; and computer software provided by means of a global computer network which assists a user in creating

customized forms” in Class 9 and “registration, transfer and account management services of domain names for identification of users on a global computer network; registration and account management services of email accounts for identification of users on a global computer network” in Class 42 (the “GoDaddy Registration”). The Petition’s Cover Sheet states that the grounds for cancellation are “Fraud on the USPTO” and the entirety of Simmons’ grounds for cancellation is reproduced below:

Statement of Grounds: I believe an employee working for the United States Patent and Trademark Office stole my idea. When I called in for advice on how to protect my idea instead the individual working for the United States Patent and Trademark Office stole my idea over 5 years ago.

(Dkt. No. 1). The Cover Sheet and these two barebones sentences are insufficient to meet the standing requirements of Section 14 of the Lanham Act, 15 U.S.C. §1064. Further, even if the Petition met the standing requirements, the Petition fails to meet the pleading requirement of Fed. R. Civ. P. 9(b), as the Petition fails to pled the elements of fraud with particularity.

## **II. ARGUMENT**

### **A. Legal Standard**

The Board should dismiss a cancellation petition for failure to state a claim when the petition fails to establish: (1) the petitioner has standing to maintain the proceeding; and (2) a valid ground exists for canceling the subject registration. TBMP § 503.02; *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (C.C.P.A. 1982). In order to survive a motion to dismiss, the petitioner must “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are insufficient to meet this burden. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). *See also, Dragon Bleu*

(*SARL*) v. *VENM, LLC*, 112 U.S.P.Q.2d 1925, 1927-29 (T.T.A.B. 2014) (motion to dismiss applicant's fraud, non-use and abandonment counterclaims granted). When deciding a motion to dismiss for failure to state a claim, the Board should accept all of the petitioner's well-pleaded complaints as true and the petition should be construed in the light most favorable to the petitioner. TBMP § 503.02; *Bayer Consumer Care AG v. Belmora LLC*, 90 U.S.P.Q.2d 1587, 1590 (T.T.A.B. 2009). Yet, even under this deferential standard, Simmons fails to state a claim because the Petition states no facts that can reasonably support the claim that GoDaddy committed fraud in obtaining the GoDaddy Registration.

**B. Simmons Lacks Standing to Challenge the GoDaddy Registration**

Standing is a threshold issue that must be alleged and proven in a cancellation action. *Lipton*, 670 F.2d at 1026. Section 14 of the Lanham Act, 15 U.S.C. § 1064, grants standing to cancel a registration to “any person who believes that his is or will be damaged” by the registration of the mark. Although the statutory threshold for establishing standing is low (a belief that the petitioner would suffer damage), the Federal Circuit has held that at a minimum, the petitioner must allege facts to show a “real interest” in the proceeding, and a “reasonable basis” for its belief that it would suffer some kind of damage as a result of the registration. *See* TBMP § 309.03(b); *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1025-28 (Fed. Cir. 1999). Simmons cannot meet either of these requirements.

Simmons fails to establish that she has a real interest in the proceeding. The “real interest” element requires that the petitioner have a direct and personal stake in the outcome of the cancellation, and not be a “mere intermeddler.” *Ritchie*, 170 F.3d at 1095. In the Petition, Simmons fails to identify how the GoDaddy Registration impairs her interests and how those interests are different from interests of mere intermeddlers. Simmons also fails to show that she

has a non-subjective belief that she will be damaged by the GoDaddy Registration. Simmons provides no details regarding the “stolen idea.” Nor does Simmons show how the theft of the idea gives her a real interest in the cancellation of the GoDaddy Registration. There is no allegation that the GoDaddy Registration prevents Simmons from using the “stolen idea.”

*Doyle v. Al Johnson’s Swedish Restaurant & Butik Inc.*, 101 U.S.P.Q.2d 1780, 1782-83

(T.T.A.B. 2012) (granting motion to dismiss where petitioner alleged that registrant’s trademark registration for “goats on a roof of grass” for use with restaurant and retail store services prevented petitioner from taking photos of a goat on a roof). The allegations in the Petition do not establish that Simmons is in a position to use the GO DADDY trademark, nor do the allegations even assert that Simmons provides similar or competing services.

Moreover, Simmons’ allegations are not reasonable. To survive a motion to dismiss, the Petition must allege facts that are more than a subjective belief, instead, the belief must have a “reasonable basis in fact.” *Ritchie*, 170 F.3d at 1095. Here Simmons alleges a vague theft of an idea by a U.S. Patent and Trademark Office employee. GoDaddy is not even mentioned in the Petition. There is no detail as to how the communication with an “individual working for the United States Patent and Trademark Office” resulted in the GoDaddy Registration. Further, even if the idea had been stolen (which it was not), trademarks do not protect ideas. The protection of ideas is the realm of patent law. Instead, trademarks “prevent consumer confusion and protect the value of identifying symbols.” *J. McCarthy on Trademarks*, §6:3, citing *Qualitex co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164-65 (1995) (“It is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time.”). Because trademarks do not protect ideas and

because Simmons failed to plead how GoDaddy was involved in the alleged theft, Simmons has asserted no reasonable basis for her claims.

As Simmons has pled no facts to establish that (a) she has a real interest in the proceedings; or (b) there is a reasonable basis for the belief, the Petition should be dismissed for lack of standing.

**C. Simmons' Claim of Fraud Fails to Allege Elements Sufficient to Cancel a Registered Mark and to Meet the Required Pleading Standard.**

Even if Simmons had standing, Simmons' claim of fraud fails to allege elements sufficient to cancel a registered mark. To properly plead fraud in a cancellation action, the petitioner must establish that the applicant "knowingly made a false, material representation of fact in connection with an application to register with the intent of obtaining or maintaining a registration to which it is otherwise not entitled." *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (reversing cancellation because there was no evidence of intent to deceive); *see also Dragon*, 112 U.S.P.Q.2d at 1927-29 (motion to dismiss granted for failure to allege fraud with particularity). A party seeking cancellation of a trademark registration for fraud bears a heavy burden, because "absent the requisite intent to mislead the PTO, even a material misrepresentation would not qualify as fraud under the Lanham Act warranting cancellation." *In re Bose*, 580 F.3d at 1243 (citing *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 1011 n.4 (C.C.P.A. 1981)).

In petitioning to cancel on grounds of fraud, a petitioner must also allege the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b). "[T]he pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud." *Asian & Western Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478, 1478 (T.T.A.B. 2009) (quoting *King Auto.* 667 F.2d. at 1010). Here, Simmons does not allege the elements of fraud generally, much

less with particularity. Simmons does not identify any false representation made by GoDaddy to the USPTO during the prosecution of the GoDaddy Registration. Simmons fails to establish that this non-existent false representation was material or that GoDaddy had any knowledge of the a false statement. Finally, Simmons fails to assert that GoDaddy acted with an intent to deceive the USPTO. Because Simmons fails to meet the required elements of pleading a claim of fraud, the Petition should be dismissed.

### **III. CONCLUSION**

Simmons fails to provide any facts that establish her direct and personal stake in the outcome of the cancellation proceeding and fails to state a reasonable basis for her belief that she is and will be damaged by the GoDaddy Registration. Thus, Simmons has no standing in this action. Even if Simmons had standing, Simmons failed to allege the elements of fraud generally, must less with the required particularity. For these reasons, GoDaddy's Motion to Dismiss should be granted.

Dated: June 3, 2016

By: /s/ Nicole M. Murray

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**CERTIFICATE OF SERVICE**

Pursuant to T.B.M.P § 113.03, I hereby certify that a true and complete copy of the foregoing **GoDaddy's Motion to Dismiss** has been served on Kimberly Simmons by mailing said copy on June 3, 2016, via U.S. Mail to:

Kimberly Simmons  
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